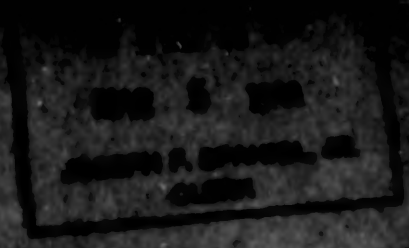

No. 89-453

In the Supreme Court of the United States

OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT INTERVENOR
RAINBOW BROADCASTING COMPANY

MARCOT POLIVY
Counsel of Record
KATRINA RENOUF
Counsel
RENOUF & POLIVY
1532 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 265-1807

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QUESTION PRESENTED

Whether the Commission's congressionally mandated consideration of broadcast applicants' minority status as one enhancing factor in comparative licensing proceedings is consistent with the equal protection component of the Fifth Amendment?

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BRIEF FOR RESPONDENT INTERVENOR RAINBOW BROADCASTING COMPANY

STATEMENT OF THE CASE

The Commission Proceeding

This case arises from a decision of the Federal Communications Commission authorizing a new UHF television station on Channel 65, Orlando, Florida. In 1983, three mutually exclusive applications were filed for the Orlando facility by the petitioner, Metro Broadcasting, Inc.; the respondent intervenor, Rainbow Broadcasting

Company; and Winter Park Communications, no longer a party. After evidentiary hearing, a Commission administrative law judge issued an initial decision finding Rainbow unqualified and granting Metro's application. Pet. App. 2a-4a, 88a-90a.

The Commission's Review Board reversed that decision, holding Rainbow qualified and comparatively superior. Pet. App. 64a-93a. The "general evaluative framework" governing that comparison is set out in the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 604 (D.C. Cir. 1984), *cert denied*, 470 U.S. 1027 (1985). The comparison, summarized by the *West Michigan* court at 735 F.2d 604-607, seeks to achieve "maximum diffusion" of station ownership and "best practicable service to the public," *Policy Statement, supra*, 1 F.C.C.2d 393, 394, by evaluating competing applications against six factors. The first, diversification of control of mass media, assesses other media holdings of applicants, assigning the greatest credit to an applicant with no ownership interest in any medium of mass communication. Id., at 393-394.[1] The second, full time owner participation in station management ("integration of ownership and management"), *id.*, at 395, involves two categories of comparative credit, the second contingent upon receipt of the first. Applicants receive "quantitative" integration credit equal to the percentage of their ownership proposing to work at the station full time (sharply reduced credit is awarded for substantial but less than full time integration), with degree of credit

[1] Diversification "has been viewed by the Commission as 'a factor of primary significance' in determining who among competing applicants in a a comparative proceeding should receive the initial license for a particular broadcast facility." *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 781 (1978)(quoting from the *Policy Statement, supra*).

also influenced by significance in policy and management terms of the staff jobs to be held. *Ibid.*

If and only if quantitative integration credit has been given, applicants may also receive additional credit directly proportional to the percentage of their quantitative integration, *Debra D. Carrigan*, 104 F.C.C.2d 826, 833 (1986), for various enhancing attributes.[2] The *Policy Statement*, 1 F.C.C.2d, at 395-396, identifies local residence, broadcast experience and past participation in local civic affairs. Pursuant to the *Policy Statement's* promise of "changes in policy [when] deemed appropriate," *id.*, at 399, the minority enhancement was subsequently added to these factors, *see WPIX, Inc.*, 68 F.C.C.2d 381, 411-412 (1978), as was a similar but "lesser" enhancement for female ownership, *Mid-Florida Television Corp.*, 69 F.C.C.2d 607, 652 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981).[3]

In the comparative evaluation here, Rainbow was awarded 90% quantitative integration credit for the full time participation of its 85% owner, Joseph Rey and 5%

[2] These attributes cannot overcome a clear quantitative difference, *Committee for Community Access v. F.C.C.*, 737 F.2d 74, 81 (D.C. Cir. 1984); the Commission has found a 12.5% differential to constitute a "decisive" quantitative advantage, *New Continental Broadcasting Company*, 88 F.C.C.2d 830, 850 (Rev. Bd. 1981), *reconsideration denied*, 89 F.C.C.2d 631 (1982), *reopened and remanded on other grounds*, 98 F.C.C.2d 301 (1984).

[3] The *Policy Statement's* third and fourth factors, considered only upon appropriate prehearing showing and not here relevant, permit credit for program proposals demonstrating "superior devotion to public service," 1 F.C.C.2d, at 397, and credit or discredit for "unusually good or unusually poor" records compiled by stations owned by an applicant, 1 F.C.C.2d, at 398. The fifth factor credits applicants for engineering characteristics of their applications making for more efficient use of the frequency, 1 F.C.C.2d, at 398; and the sixth factor, licensee character, is considered only as a disabling negative, 1 F.C.C.2d, at 399.

owner Esperanza Rey-Mehr, whereas Metro was awarded credit for 79.2% full time participation and 19.8% part time participation. Metro received more qualitative enhancement credit for past local residence, Rainbow more for integrated minority ownership and broadcast experience. Only Metro received civic participation credit, only Rainbow received female enhancement. Overall, the Review Board concluded that Rainbow's substantial preferences for broadcast experience and minority ownership and its preference for 5% female ownership outweighed Metro's moderate local residence and civic activities preferences. On the basis of its quantitative and qualitative integration edge, Rainbow was comparatively preferred. Pet. App. 88a, 90a.

The Commission denied review, Pet. App. 60a, and the Review Board's decision became the final agency decision under 47 U.S.C. § 155(c)(3). In denying review, the Commission noted that even if Metro had been granted a "substantial" preference for local residence instead of a "moderate" one and even if Rainbow had been given no credit for its 5% female ownership, the outcome of the case would not have been changed. Pet. App. 61a.

The losing applicants filed appeals from the Commission's decision with the Court of Appeals for the District of Columbia Circuit.

Subsequent Proceedings

After the case had been briefed in the Court of Appeals and prior to oral argument, the Commission initiated a rulemaking proceeding to explore its constitutional and statutory authority to award comparative preferences based on race or sex. ***Reexamination of Racial, Gender or Ethnic Classifications***, 1 FCC Rcd 1315 (1986). Based upon the initiation of this Inquiry, the Commission requested and received remand of this

proceeding. Pet. App. 58a. Upon remand the Commission concluded that Rainbow's quantitative integration advantage over Metro "might not be considered dispositive in this case" and that "deletion of Rainbow's minority and female preferences could reverse the outcome of the case." Pet. App. 56a-57a. The proceeding was accordingly held in abeyance pending the outcome of the Inquiry. Pet. App. 57a.

However, the Inquiry was terminated by enactment of the Continuing Appropriations Act for Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987) (Pet. App. 100a), which prohibited further consideration of the question by a proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, *as amended*, [52] R.R.2d [1301] (1982) and *Mid-Florida Television Corp.*, [69] F.C.C.2d 607 Rev. Bd. (1978), which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension [of] any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.[4]

[4] Essentially identical provisions have been enacted by the Congress and signed by the President for all subsequent fiscal years. See Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988) (Pet. App. 101a) and Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, 103 Stat. 988 (1989) (App. 1a).

In compliance with the Continuing Appropriations Act, the Commission terminated the *Inquiry* without making any findings or conclusions and ordered reinstatement of its comparative licensing policies regarding race, ethnicity and gender preferences as they had existed prior to September 12, 1986. *Reexamination of Racial, Ethnic or Gender Classifications* 3 FCC Rcd 766 (1988). By *Order* dated February 16, 1988, the Commission reactivated the instant proceeding and reinstated the Review Board's decision granting the application of Rainbow Broadcasting Company. Pet. App. 48a. The proceeding was returned to the Court of Appeals and the earlier appeals reinstated and rebriefed.

The Court of Appeals Decision

The Court of Appeals held that "the legality of the FCC's use of a qualitative enhancement for minority ownership... is controlled by our decision in *West Michigan*, 735 F.2d 601, [that] exactly the same policy 'easily passes constitutional muster,' *id.* at 613...." Pet. App. 10a.[5]

In *West Michigan*, the court noted that minority status is "but *one factor* in a competitive multifactor selection system that is designed to obtain a diverse mix of broadcasters" and that the Commission's action "came on the heels" of a congressional finding, made in conjunction with the adoption of minority preferences in licensing lotteries, that the "extreme underrepresentation of minorities and their perspectives in the broadcast mass media

[5] The Court of Appeals declined to consider the validity of the Commission's female enhancement policy because the Commission had determined that the outcome of the proceeding would be unchanged if Rainbow were not given credit for its 5% female integration. Pet. App. 10a n.5. The validity of the Commission's female preference is accordingly likewise not before this Court.

... was a part of 'the effects of past inequities stemming from racial and ethnic discrimination' H.R. Conf. Rep. No. 97-765, 97th Cong., 2nd Sess. 43 (1982), U.S. Code Cong. & Admin. News 1982, p. 2287." *West Michigan Broadcasting Co. v. F.C.C.*, *supra*, 735 F.2d 601, 613-614. Thus, the *West Michigan* court reasoned, "Congress must be understood to have viewed the sort of enhancement used here as a valid remedial measure." *Id.*, at 614.

In this case the court below concluded that the constitutional framework of *West Michigan* was unimpaired by this Court's subsequent decision in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), because *West Michigan* relied upon *Fullilove v. Klutznick*, 448 U.S. 448 (1980), which the *Croson* court continued to consider good law, and *Regents of the University of California v. Bakke*, 438 U.S. 265, 311-315 (1978)(plurality opinion), whose reasoning that racial diversity constitutes a "constitutionally permissible goal, independent of any attempt to remedy past discrimination," found no disagreement in *Croson*. Pet. App. 13a. The court concluded (Pet. App. 13a-14a) that *Croson*'s two grounds for distinguishing *Fullilove* (*see* 109 S. Ct. 706, 718-720, 723-724), also distinguish *Croson* from this case. First, *Croson* involved an unyielding racial quota and *Fullilove* a flexible 10% set-aside: "The FCC's policy, however, is even more flexible than the *Fullilove* set-aside plan: it does not involve any quotas or fixed targets whatsoever, and minority ownership is simply one factor among several that the Commission takes into account in the award of broadcast licenses." Pet. App. 13a-14a. Second, *Croson* involved enactments of state or local governments as opposed to enactments of the Congress, whose broad remedial powers under § 5 of the fourteenth amendment were at issue in *Fullilove* as well as this case. Pet. App. 14a. Congress, the court noted, "has interceded

at least twice to endorse the FCC's policy of enhancements for minority ownership in the award of broadcast licenses." *Id.*

A dissent by Judge Williams reflected his view that *Croson* requires application of a "strict scrutiny" standard to all race-based decisions and that the Commission's diversity of programing standard cannot be equated with the diversity of educational admissions policy of *Bakke*, 438 U.S., at 311-312 (Powell, J.). Pet. App. 20a-21a. The dissent interpreted "program diversity" as meaning race is a predictor of particular programing. Having thus defined diversity, the dissent characterized it as constituting "precisely the racial stereotyping that the *Croson* majority defined as the central evil in the use of race-based decision criteria." Pet. App. 22a. In the dissenter's opinion, *Croson* and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) "have toppled *West Michigan*'s constitutional validation of the program diversity theory," Pet. App. 33a, and *Croson* "leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences," Pet. App. 41a. Even if this "ambiguity" were resolved in favour of the minority enhancement policy and it were not deemed a quota or a policy placing an undue burden on non-minority applicants, Judge Williams would nevertheless find the policy deficient for failure "to consider alternative non-racial solutions and the omission of a waiver provision." Pet. App. 45a.

Development Of The Commission's Minority Enhancement Policy

The Commission and the Courts

The Commission's exclusive authority to license radio and television stations in the United States derives from

the Communications Act of 1934, 47 U.S.C. §§ 301, 303, 307. The Act requires that all applicants possess basic qualifications to be licensees but leaves to the Commission the duty to define the specific requirements by regulation.[6] When mutually exclusive applications are filed, the Commission is required to hold an evidentiary hearing to determine, on a comparative basis, which applicant would best serve the public interest, convenience and necessity. 47 U.S.C. § 307; *Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 333 (1945).

Over the years, the Commission has developed criteria for evaluating the comparative merit of mutually exclusive applications. In codifying the general framework for comparative decisions, the *Policy Statement, supra,* 1 F.C.C.2d, at 399, promised that it did "not intend to stultify the continuing process of reviewing our judgment on these matters" and that changes in policy would continue to be made as "appropriate", a promise fulfilled with adoption of the policy at issue here.

In 1968, in response to the adoption of the 1964 Civil Rights Act and the *Report of the National Advisory Commission on Civil Disorders* (1968) (*Kerner Commission Report*),[7] the Commission began instituting licensee obligations aimed at increasing the very limited participation of minorities in the broadcasting industry. Five times

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[6] 47 U.S.C. § 308(b) states in pertinent part that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station. . . ."

[7] In 1968 the Kerner Commission cautioned that "the media report and write from the standpoint of a white man's world. The ills of the ghetto, the difficulties of life there, the Negro's burning sense of grievance, are seldom conveyed." *Kerner Commission Report, supra,* 203.

in the following decade, the Commission sought, through increasingly stringent employment, affirmative action and ascertainment requirements, to encourage increased minority participation in broadcasting.[8]

In 1973, in *TV 9, Inc. v. F.C.C.*, 495 F.2d 929, 937 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), the D.C. Circuit ruled minority ownership a relevant comparative factor related to the Commission's appropriate interest in ensuring "broader community representation and practicable service to the public" and the "diversity of ownership of the mass media and diversity of ideas and expression required by the First Amendment." *Id.*, at 937 & n.26 (citing *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201, 1213 n.36 (1971)). The court held the "reasonable expectation" that minority ownership would "increase diversity of content" a proper basis for award of credit. *Id.*, at 938. These rulings were reaffirmed two years later, in *Garrett v. F.C.C.*, 513 F.2d 1056 (D.C. Cir. 1975), in which the court found the minority status of an owner operator an appropriate factor for consideration in the context of a request for waiver of a technical signal coverage rule.

After the decisions in *TV 9* and *Garrett*, the Commission began giving affirmative comparative consideration to minority ownership as an enhancement or plus factor when proposed in conjunction with active station management participation. *See WPIX, Inc.*, 68 F.C.C.2d 381,

[8] *Nondiscrimination in Employment Practices of Broadcast Licensees*, 60 F.C.C.2d 226 (1976); *Nondiscrimination in Employment Practices of Broadcast Licensees*, 54 F.C.C.2d 354 (1975); *Nondiscrimination in Employment Practices of Broadcast Licensees*, 23 F.C.C.2d 430 (1970); *Nondiscrimination in Employment Practices of Broadcast Licensees*, 18 F.C.C.2d 240 (1969); and *Nondiscrimination in Broadcast Licensee Employment Practices*, 13 F.C.C.2d 766 (1968); *Ascertainment of Community Problems by Broadcast Applicants*, 57 F.C.C.2d 418 (1976)..

411-412 (1978). Also in 1978, the Commission conceded defeat in its 10 year effort to affect the historic underrepresentation of minorities in the broadcast industry through indirect means. It was "compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980 (1978) (footnotes omitted).[9]

> This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communictions Act of 1934, but also of the First Amendment.
>
> Thus, despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is another significant way of

[9] The Commission had available considerable documentary evidence of minority exclusion compiled by various industry and government agencies. *See, e.g.*, United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television* (1977); Federal Communications Commission's Minority Ownership Task Force, *Minority Ownership Report* (1978) (less than 1% minority control of 8500 broadcast stations); United States Commission on Civil Rights, Federal Civil Rights Enforcement Effort-1974, vol. 1 (1974) (33 minority owned radio stations out of 7,000 licensed; no minority owned television station out of 1,000 licensed); United States Commission on Civil Rights, Federal Civil Rights Enforcement Effort-1971 (10 minority owned radio stations out of 7,500 licensed; no minority owned television station out of 1,000 licensed).

fostering the inclusion of minority views in the area of programming.

Id., at 980-981.

In *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985), as already noted (see pages 6-8, above), the minority enhancement policy was upheld against the same equal protection challenge here leveled. The court (735 F.2d, at 612-616) found the policy to be both congressionally approved[10] and constitutionally sound within the holdings of *Fullilove v. Klutznick*, 448 U.S. 448 (1980) and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

Congressional Action

The Congress has repeatedly endorsed and affirmatively required the Commission's minority enhancement policy. As early as 1981, Congress enacted an amendment to the Communications Act to permit the Commission to award certain licenses by a lottery or random selection system but required that "underrepresented groups... be granted significant preferences."[11] The following year,

[10] The court found that the Congress had affirmatively approved the preference on diversity grounds and that Section 115 of the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087, 1094-95 (codified at 47 U.S.C. § 309(i)(3)(A) and (C)(ii)) represented "congressional confirmation to the factual bases of those policies' remedial nature." Id., at 616.

[11] Communications Amendments Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 736-737 (1981). The Commission declined to implement the law on the theory that the requirement of preferences for "underrepresented groups" was so lacking in specificity that any Commission action would be subject to "serious and repeated" legal challenge. *Random Selection Lottery Systems*, 89 F.C.C.2d 257, 279-280 (1982).

Congress enacted another version of the lottery statute and noted the "nexus" between minority ownership and diversity, H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40 (1982), while emphasizing the seriousness with which it viewed the "severe underrepresentation of minorities in the media of mass communication" which had resulted from "past inequities stemming from racial and ethnic discrimination". H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). The Report makes clear that Congress chose the minority preferences as an appropriate way of "remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communication, while promoting the primary communications policy of objective of achieving a greater diversification of the media of mass communication." *Id.*, at 44.

In 1986, when the Commission initiated its Inquiry into the continued validity of its minority and female preference policies, *Reexamination of Racial, Ethnic or Gender Classifications*, 1 FCC Rcd 1315 (1986), the Congress enacted the first of a series of legislative actions which required the Commission to terminate Docket No. 86-484 and reinstate its minority ownership policies, including the minority enhancement policy. Continuing Appropriations Act for Fiscal Year 1988, *supra* (Pet. App. 100a).[12]

The Congress' legislative approval and requirement of the minority enhancement policy has been the result of

[12] This congressional requirement has twice been reenacted and continues in force. See Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216 (1988); Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020 (1989); *see also* S. Rep. No. 144, 101st Cong., 1st Sess. 64 (1989); S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987).

extensive and continuing legislative fact finding and oversight. Over a period of almost a decade, Congress has held numerous hearings involving the lack of minority broadcast station owners.[13]

SUMMARY OF ARGUMENT

I

Maximizing the number and variety of broadcast voices available to the listening public is the primary objective of the Commission's licensing policy. This Court has approved the Commission judgment that diversity of programming results from diversified station ownership. The almost total absence of minority broadcast voices and the consistent, long term failure of less direct regulatory efforts to increase minority station ownership justified the Commission's decision to make minority status one of several subordinate comparative licensing factors enhancing the credit awarded to applicants proposing to be integrated into daily station management. The minor and variable weight of the

[13] *See, e.g.*, Minority Ownership of Broadcast Stations: Hearings Before the Subcomm. on Communications of the Senate Comm. on Communications, Science and Transportation, 101st Cong., 1st Sess. 17-19, 75-77 (1987); Hearings on H.R. 2763 Before a Subcomm. of the Senate Comm. on Appropriations, 100th Cong., 1st Sess. 17-19, 75-77 (1987); Minority Owned Broadcast Stations: Hearings on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 99th Cong., 2d Sess. (1986); Minority Participation in the Media: Hearings on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. (1983).

enhancement as one of several in a changing mix ensures flexibility in its case by case application and the Commission's expressed intent and statutory obligation to alter policies as circumstances change ensure that it will not outlive the public need to which it responds. The constitutional imperative underlying the diversity goal and the risks of censorship implicit in programmatic efforts to diversify broadcast speech lend further support to the Commission's expert judgment that the minority enhancement policy is a necessary response to an intractable problem.

II

Whether the minority enhancement policy is considered as a First Amendment driven quest for diversity or in the more familiar fourteenth amendment/equal protection idiom of an effort to remedy the historical exclusion of minorities from broadcasting, the ultimate victim of exclusion and beneficiary of diversity is the listening public. Viewed in either light the policy survives equal protection review. It must be viewed as an act of Congress employing racial or ethnic criteria and thus mandating close examination even in the remedial context to ensure that its objectives are within the power of Congress. Both the diversity and the remedial objectives are clear, based on an extensive record and well within the comprehensive remedial power of Congress. *Fullilove v. Klutznick*, 448 U.S. 448, 483 (1980). The policy is narrowly tailored to meet either of its objectives. It responds to a demonstrated need for inclusion of minorities and a demonstrated failure of race neutral means. Its "plus factor" approach is the most modest possible and any minimal burden imposed on nonminority applicants reflects only the shared cost of eradicating discrimination.

ARGUMENT

I. THE MINORITY ENHANCEMENT POLICY IS A CONSTITUTIONALLY LEGITIMATE EXERCISE OF THE COMMISSION'S JUDICIALLY APPROVED STATUTORY MANDATE TO ADVANCE THE COLLECTIVE FIRST AMENDMENT RIGHT OF THE VIEWING AND LISTENING PUBLIC TO PROGRAMING FROM DIVERSE SOURCES.

The Commission's minority enhancement policy holds that given the severe underrepresentation of minorities in broadcast ownership, the public benefits found to inhere in local station ownership and management are enhanced if local owner-managers include members of minority groups because such operations have the potential to increase the diversity of programing available to the listening public. The petitioner's equal protection challenge to the policy wrenches it from its necessary legal and factual context and analyzes it by reference to regulatory contexts in which it finds no parallel, thus fatally distorting the focus of the comparative licensing process and ignoring the constitutional imperative on which the policy rests. The general breadth of the Commission's discretion; the narrow focus and minor role of this licensing policy in the exercise of that discretion; and the demonstrated and irreplaceable contribution of the policy to the preservation of First Amendment values which is the Commission's unique mandate, suffice to establish that in adopting the challenged enhancement policy the Commission has stayed well within the constitutional limits of its power.

A. The Constitutional Propriety Of The Minority Enhancement Policy Must Be Assessed In Light Of The Origin And Purpose Of Commission Regulation.

A valid constitutional analysis of the challenged policy must take as its starting point the root of the Commis-

sion's authority in the Congress' commerce power and its intended purpose of providing "government supervision over economic enterprise." *F.C.C. v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141, 142 (1940). Given this origin and purpose, the Commission was delegated "power far exceeding and different from the conventional judicial modes for adjusting conflicting claims," requiring it to "initiate inquiry" and "control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of... the whole nation in the enjoyment of [communications] facilities ...." *Id.*, at 142-143.

The Commission's power, then, is not akin to the "reviewing power... conferred upon the courts under Article III," *id.*, at 141, and "[t]he Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication," id., at 138. Rather, the Commission's is the "plenary" power of an expert body "to formulate and implement" policy in its mandated area of expertise, a power which carries with it the discretion, where dictated by that mandate, to adopt a race conscious policy such as this one. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971); NAACP v. F.P.C., 425 U.S. 662, 670 n.7 (1976); *see Regents of the University of California v. Bakke*, 438 U.S. 265, 313 (1978)(opinion of Powell, J.).

B. The Judgment That The Minority Enhancement Policy Is Essential To Promotion Of The Commission's Diversity Objective Was Well Within The Bounds Of Commission Discretion.

The Communications Act "puts upon the Commission the burden of determining the composition of [broadcast] traffic" subject to the "criterion" of "the 'public interest, convenience, or necessity.'" *National Broadcast-*

ing Co. v. United States, 319 U.S. 190, 216 (1943). "The 'public interest' to be served under the Communications Act is... the interest of the listening public in 'the larger and more effective use of radio.' § 303(g)." *Id.*

Central to the effectuation of this mandate has been "the Commission's goal of promoting diversity in radio programming." *F.C.C. v. WNCN Listeners Guild*, 450 U.S. 582, 600 (1981). "In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *F.C.C. v. National Citizens Committee for Broadcasting*, 436 U.S. 776, 780 (1978). "This Court has approved of" that goal and recognized that "the Commission is... vested with broad discretion in determining... what policies should be pursued in promoting it." *F.C.C. v. WNCN Listeners Guild, supra*, 450 U.S. 582, 600.

The minority enhancement policy reflects the Commission's judgment that "[a]dequate representation of minority viewpoints in programming... enriches and educates the non-minority audience" and "enhances the diversified programming which is a key objective... of the Communications Act [and] the First Amendment." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 981 (1978). Its adoption followed years of less direct efforts to encourage minority broadcast entry, which left minority licensees essentially absent from the ranks of station owners. See *supra*, pages 9-11, 14 n.13; *West Michigan Broadcasting Co. v. F.C.C.*, 735 F.2d 601, 603 n.5 (D.C. Cir.), *cert. denied*, 470 U.S. 1027 (1985).

The decisions of this Court have long and consistently made clear that "the First Amendment... values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. 'The "public interest" standard necessarily invites reference to First Amendment principles,' *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving 'the widest possible dissemination of information from diverse and antagonistic sources,' *Associated Press v. United States*, 326 U.S. 1, 20 (1944). See *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 385, 390 (1969). See also *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-669, & n.27 (1972)(plurality opinion)." *F.C.C. v. National Citizens Committee for Broadcasting, supra*, 436 U.S., at 795.

C. The Minority Enhancement Policy Addresses An Imbalance In Industry Ownership Patterns By Assigning Minor Additional Comparative Credit For The Greater Service To The Public Potentially Available From Minority Owner Managers.

The Commission's comparative licensing proceedings have been governed from the outset by the principle that "[t]hose who give the least [service] must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not... the individual broadcaster...." *Second Annual Report*, Federal Radio Commission, 1928, pp. 169-170 (quoted in *Pottsville, supra*, 309 U.S., at 138 n.2). Thus the Commission has sought so to select and regulate its licensees as to ensure that they provide the public that "access to social, political, esthetic, moral, and other ideas and experiences" which is its "collective right," *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

Consistent with this controlling formulation, the Commission's minority enhancement policy assigns an affirma-

tive public interest value to applications which would bring the public the previously unheard voices and perspectives of minority broadcasters. The policy makes no change in the focus of the comparative licensing process; it simply adds one more yardstick against which to measure the potential value to the public of the service proposed by competing applicants, thus broadening rather than narrowing the basis for choice.

The Commission weighs competing applications in light of applicants' other media holdings; proposed full time station management roles ("quantitative integration"); proposed programing demonstrating "superior devotion to public service"; "unusually good or unusually poor" past ownership records; technical engineering attributes; and disabling character flaws. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394-399 (1965); see *supra*, pages 1-4. Applicants receiving quantitative integration credit are also entitled to proportional "qualitative" credit for attributes enhancing the value of their integration, including past and prospective local residence, civic participation, past broadcast experience and, for well over a decade now, the minority status of applicants proposing integration.

In this case, only integration of ownership offered a sufficient basis for preference. Rainbow was credited with integrating 90% of its ownership into full time station management, Metro with 79.2% (plus minor part time credit). Pet. App. 86a. While the Commission's Review Board deemed Rainbow's quantitative advantage "probably" dispositive, Pet. App. 87a, Rainbow also prevailed in the assessment of enhancements. Pet. App. 81a-82a, 87a-88a. Both applicants received credits of varying degree and attached to various percentages of ownership for past local residence, future local residence, broadcast experience and minority ownership; Metro also received some civic activity credit and Rainbow slight credit for a

5% integrated female owner. Weighing all these merits in the balance, the Review Board concluded that Rainbow's "somewhat outweigh[ed]" Metro's. Pet. App. 88a. Given its "edge" on both quantitative and qualitative integration, Rainbow received a "slight" but ultimately dispositive integration preference. Pet. App. 88a, 90a.

Even as applied in the present close comparative case, it is manifest that the minority enhancement policy is but a small element in a complex decisional process, bearing no resemblance to the "inflexible percentages based solely on race" disfavored by the Court, *Fullilove v. Klutznick*, 448 U.S. 448, 480 (1980); *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 728-729 (1989). No plus factor is a prerequisite to eligibility for the license; this enhancement is but one sub-category of one of six general factors weighed in the selection process. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 317-318 (1978).

Indeed, its subordinate status is built in because its weight is always controlled by the percent of quantitative integration to which it attaches. Here, for example, Metro was defeated not by its lesser minority ownership but by its failure to establish its quantitative integration claim. Even if all of Metro's integrated owners had been minorities, Rainbow would still have received a greater enhancement because it proposed greater ownership integration, a more important credit and one which is both voluntary and non-race based. The actual decisional significance of the minority preference, and thus its potential impact on non-minorities, even in this case, is thus more apparent than real.[14] Its practical effect is

[14] Moreover, while this enhancement opens to minorities an area of credit unavailable to nonminorities, credit is almost as certainly withheld from minority applicants for unusually good broadcast records, since that credit attaches only to the ownership role from which they have been almost entirely excluded.

simply to encourage prospective minority applicants to apply and applicants in general to include members of minority groups among their number, since all applicants attempt to put together applications reflecting as many comparative plus factors as possible—an act of self interest which carries equal public benefit.

Neither in a given case nor generally can the policy serve to rigidify the comparative process. No matter how specifically recited or ranked the decisional factors may be, they are not a mathematical formula and their application is necessarily subjective. The amount of weight given any factor will depend on the unique mix of attributes characterizing the applications in each case. Even within the single factor of integration of ownership, the weight attaching to any subordinate point of preference depends on the size of the ownership interest to which it attaches, the degree to which it exceeds any comparable credit to an opponent and what other enhancements it accompanies.

The flexibility of the criteria from case to case is matched by their flexibility from time to time. The *Policy Statement* notes the Commission's "continuing process of reviewing our judgment on these matters," 1 F.C.C.2d, at 399, and it is implicit in the public interest standard: "In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of [a policy], it must be assumed that the Commission will act in accordance with its statutory obligations." *National Broadcasting Co. v. F.C.C.*, *supra*, 319 U.S. 190, 225. Judicial approval of the minority enhancement policy thus involves no risk of "uphold[ing] remedies that are ageless in their reach into the past, and timeless in their ability to affect the future," *Wygant v. Jackson Board of*

Education, 476 U.S. 267, 276 (1986) (opinion of Powell, J.).

D. Extirpation Of The Minority Enhancement Would Require Radical Reordering Of Settled Constitutional Principles Governing Commission Action.

The Commission's actions are at once constrained and compelled by its unique and perilous First Amendment mandate. "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of a great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century," during which the Congress and the Commission "have established a delicately balanced system of regulation intended to serve the interests of all concerned." *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1973). The Commission must serve on the one hand as "guardian of the public interest," *id.*, at 117, charged to advance "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), and on the other hand must avoid "the risk of an enlargement of government control over the content of broadcast" speech, *CBS*, *supra*, 412 U.S., at 126.

It is the long standing conviction of the Commission, the Congress and the court charged with review of Commission licensing decisions that the minority enhancement policy is essential to achievement of the Commission's diversity goal. See *supra*, pages 8-14. That being so, any detriment to the private business interests of individual license applicants resulting from application

of the enhancement policy is a matter which cannot be deemed an appropriate counterweight to the public good sought through application of the policy. This is not a case of disadvantaging one category of applicant in order to advantage another;[15] it is rather a situation in which one category of applicant offers a unique benefit entitled to comparative weight. Should that weight in any case prove decisive, then that is simply a case of sacrificing one of "those who give the least" for one of "those who give the most." *See F.C.C. v. Pottsville Broadcasting Co., supra,* 309 U.S. 134, 138 n.2.

It is objected that the Commission's conviction of benefit stands unproven. That is an inadmissible objection. It is the considered judgment of the expert body charged with making judgments in this area that there is a sufficient nexus between diversity of ownership and diversity of programing perspective to warrant the policy. This Court has long "recognized that the Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations"; that "[i]n such cases complete factual support for the Commission's ultimate conclusions is not required, *F.C.C. v. WNCN Listeners Guild,* 450 U.S. 582, 594-595 (1981); and that the question whether diverse ownership would lead to diversity of viewpoint is precisely such a question, *F.C.C. v. National Citizens Committee for Broadcasting,* 436 U.S. 775, 796-799 (1978). In *NCCB* (at 796-797) the Court also identified the fundamental danger facing any more direct or non-structural approach to achieving the

[15] In this connection it is not without relevance that a license applicant, unlike a job applicant or a candidate for school admission, is a business entity which more often than not includes multiple individuals chosen for their various contributions to an ideal mix, by virtue of where they live, what media interests they hold and so on. Moreover, even the marginal constraints imposed by the policy are limited to a single method of station acquisition.

desired diversity: "As the Court of Appeals observed, 'diversity and its effects are elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'"

In fact, however, there is more at work here than an agency mandate; it is a bedrock principle of our First Amendment jurisprudence and, indeed, our societal pantheon of shared values, that "right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y.), *affirmed,* 326 U.S. 1 (1945)(Hand, J.). Indeed, it was precisely that assumption of the primary importance of diversity which underlay the judgment of a majority of the Court in *Regents of the University of California v. Bakke,* 438 U.S. 265, 272, 314, 320, 326 & n.1 (1978) that "the interest of diversity is compelling in the context of a university's admissions program."

It is suggested as well that to act on the knowledge that our social, cultural and ethnic backgrounds affect our outlooks amounts to unconstitutional racism. Such an artificial viewpoint both denies us the enjoyment of our differences and pretends away such basic problems addressed by the policy as "a press that...reflects the biases, the paternalism, the indifference of white America," *Kerner Commission Report, supra,* 203. It is, at bottom, a rejection of the 50 year judicially approved quest for program diversity. However, it is also not legal theory but social opinion and accordingly offers no basis for judicial displacement of agency discretion, " 'since Congress has confided the problem to the latter.' *F.C.C. v. WOKO, Inc.,* 329 U.S. 223, 229 (1946). 'Courts should not overrule an administrative agency decision merely because they disagree with its wisdom.' *Radio Corp. of*

America v. United States, 341 U.S. 412, 420 (1951)." *CBS, Inc. v. F.C.C.*, 453 U.S. 367, 394 (1981).

The minority enhancement policy is in the mainstream of Commission regulation. Both the legitimacy and the constitutional and statutory necessity of its diversity objective have been confirmed in decisions of this Court spanning more than half a century. The Commission devoted some 10 years to a varied and unsuccesful effort to reach the same goal through less direct regulations. Notwithstanding the contrary protestations of the petitioner, the policy imposes little if any burden on non-minority applicants and any such burden is no different in effect from that inherent in the comparative process; many well qualified applicants must be denied so that others who better satisfy the public's paramount service needs may be granted.

Finally, what is really challenged here is not an isolated regulation. It is a small but vital segment of a delicate regulatory scheme whose principal function is protection of our collective right to receive "information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945). There is no precedent which requires or even suggests the propriety of dismantling that regulatory scheme simply because this policy in literal fact involves a race based classification.

II. THE MINORITY ENHANCEMENT POLICY SATISFIES THE DEMANDS OF PREVAILING EQUAL PROTECTION SCRUTINY WHETHER CONSIDERED IN LIGHT OF ITS UNIQUE FIRST AMENDMENT IMPERATIVE OR ITS MORE TRADITIONAL REMEDIAL PURPOSE.

The minority enhancement policy is an act of Congress. It has enjoyed explicit congressional approval since

1982[16] and in 1987 it was legislatively enacted.[17] In 1982, Congress identified its objectives in endorsing the minority enhancement policy: to further its goal of encouraging greater diversity of programing and viewpoint in broadcasting; and to remedy the historic "severe underrepresentation" of minorities in broadcasting. H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). The interrelationship of these two objectives led Congress to conclude that:

> One means of remedying the past economic disadvantage to minorities which has limited their entry into various sectors of the economy, including the media of mass communications, while promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications, is to provide that a significant preference be awarded to minority-controlled applicants in FCC licensing proceedings for the media of mass communications.

Id., at 44. To support the policy under review, it is necessary that at least one of its goals constitute a compelling governmental interest.

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[16] See footnote 10, *supra*. In 1982 the Congress authorized Commission use of a random selection lottery for the awarding of certain licenses, but required that in administering the lottery the Commission must include "significant preferences" for applicants increasing diversification of ownership in general, plus "an additional significant preference" for minority applicants. Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 (codified at 47 U.S.C. § 309(i)(3)(A). That remediation of past discrimination as well as diversification was an objective of this legislation is clear from the fact that the preference was to be applied to both content and noncontent communications services.

[17] Pub. L. No. 101-162, 103 Stat. 988 (1989) (App. 1); Pub. L. No. 100-457, 102 Stat. 2216-17 (1988) (Pet. App. 101a); and Pub. L. No. 100-202, 101 Stat. 1329 (1987)(Pet. App. 101a).

A. The Objectives Of The Minority Enhancement Policy Are Within The Power of Congress.

At the outset it is clear that the minority enhancement policy must be viewed as an act of Congress[18] and reviewed as "a program that employs racial or ethnic criteria," a fact which, "even in a remedial context, calls for close examination", *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980)(Burger, C.J.). The "close examination" is to determine whether the "*objectives* of this legislation are within the power of Congress," *id.*, at 473. If the answer to the first inquiry is affirmative, the next inquiry is "to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.*, at 473.

Where, as here, an act of Congress is under review, it is the power of Congress that must first be identified. The Communications Act, the statutory vehicle through which Congress has chosen to regulate broadcasting, derives from the Commerce Clause, U.S. Const. Art. I, § 8, *United States v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141-143 (1940), and Congress' broad power "to enforce by appropriate legislation" the equal protection guarantees of the fourteenth amendment constitutes the relevant power of Congress, *Fullilove*, at 472.

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[18] While the Congress chose to act through the vehicle of appropriations bills, the resulting action is nevertheless an "act of Congress". *National Treasury Employees Union v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984). "The reach of the spending power of Congress is at least as broad as the regulatory powers of Congress." *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980).

The congressional objective in endorsing and adopting the minority enhancement policy has been articulated on multiple occasions: in 1982 in conjunction with the adoption of random selection lotteries, Congress found minority preferences "an important factor in diversifying the media of mass communications" and said "that the effects of past inequities stemming from racial and ethnic discrimination have resulted in severe underrepresentation of minorities in media of mass communication . . . ." H.R. Conf. Rep. No. 765, 2d Sess., 43. In 1987, Congress adopted the first of three appropriations bills requiring the reinstatement and retention of, *inter alia*, the minority enhancement.[19] Pet. App. 101a.

Congress' objectives of furthering diversity of broadcast ownership and increasing minority ownership were clear and well within its power: "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Fullilove, supra*, 448 U.S., at 483. Although "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings," *id.*, at 478, here Congress had an extensive record of hearings and documentary evidence, demonstrating the "strong basis in evidence for its conclusion that remedial action was necessary," *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion).

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[19] *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987). S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1989) states: "Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences."

B. The Minority Enhancement Policy Is Narrowly Tailored To Achieve Its Objectives.

The minority enhancement policy is narrowly tailored to meet either the diversity or the remedial objective. The Commission adopted the policy only after a number of years of seeking to achieve minority participation through more indirect methods such as expanded equal opportunity rules[20] and license ascertainment requirements[21] proved insufficient. Despite the Commission's decade long effort, the Minority Ownership Task Force in 1978 was still advising the Commission that "unless minorities are encouraged to enter the mainstream of the commercial broadcasting business, a substantial portion of our citizenry will remain underserved and the larger non-minority audience will be deprived of the views of minorities. *Minority Ownership Report* 1 (1978).

In addition to the efforts directly related to minority involvement, the Commission has sought to promote new entrants by making new FM radio and low power television frequencies available for new applicants. *See Availability of FM Broadcast Assignments,* 101 F.C.C.2d 638 (1985), *reconsideration granted in part and denied in part,* 59 Rad. Reg.2d (P&F) 1221 (1986), *affirmed sub nom. National Black Media Coalition v. F.C.C.,* 822 F.2d 277 (2d Cir. 1987); *Low Power Television Service,* 51 Rad. Reg.2d (P&F) 476 (1982), *reconsideration granted in part and denied in part,* 53 Rad. Reg.2d (P&F) 1267 (1983). Despite these efforts to use race neutral alternatives,

[20] See note 8, *supra.*

[21] *See Ascertainment of Community Problems by Broadcast Applicants,* 57 F.C.C.2d 418 (1976), which provided extensive and detailed requirements for description of "community leaders" in an effort to require licensees to be responsive to their entire communities, including women and minorities.

minority owners remain severely underrepresented.[22] The fact that such race neutral efforts have been made is relevant to a determination whether race conscious efforts are necessary. *See United States v. Paradise,* 480 U.S. 149, 171 (1987).

While the comparative minority enhancement policy is race conscious, it is in the nature of a plus factor rather than a "quota" or "set aside" and no opportunity is reserved for any minority applicant. It is thus closely analogous to the Harvard plan Justice Powell was prepared to accept in *Bakke,* 438 U.S., at 315-320.

The minority enhancement is available only to applicants in comparative proceedings who have committed to work at the proposed station on a day to day basis. It is a "qualitative" integration factor equivalent to the enhancement given for past and present local residence, civic activities and broadcast experience, each of which is available only to applicants receiving quantitative integration credit. See *supra,* pages 2-3. By making the enhancement one of a number of plus factors and limiting its availability to integrated owners in proportion to their percentage of ownership, the Commission took the most limited action capable of affecting the comparative process.

C. The Minority Enhancement Policy Imposes An Insubstantial Burden on Nonminority Applicants.

A narrowly tailored program need not be the least restrictive means of implementation to be acceptable.

[22] According to the most recent survey data, 3.5% of all radio and television stations in the United States are controlled by minority individuals. The same data indicate that 81 women and minority group members received station licenses in cases where a comparative minority enhancement was awarded. Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* 40-41 (1988).

Fullilove, 448 U.S., at 508 (Powell, J.). In the case of the minority enhancement factor, the burden placed on nonminority applicants is minimal. By its terms the enhancement policy is a plus factor that cannot overcome nonracial comparative factors such as full time integration. Moreover, since the preference functions mainly in proceedings involving new station authorizations, any loss by a nonminority is more analogous to "hirings" than "firings," which require stronger justification. *Wygant v. Jackson Board of Education, supra*, 476 U.S., at 282-283 (Powell, J.). The possibility that nonminority applicants may be adversely affected by the policy does not render it improper: "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Id.*, at 280-281.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Margot Polivy
Counsel of Record
Katrina Renouf
Counsel

RENOUF & POLIVY
1532 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 265-1807

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